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80-1919

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980.

NO. _____

INTERCONTINENTAL TRANSPORTATION
SERVICES, LIMITED,
Petitioner,

vs.

MRS. HOWARD F. MCNEILL,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT.

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QUESTIONS PRESENTED FOR REVIEW

I.

Does the wife of a non-fatally injured longshoreman whose husband is subject to the Longshoremen and Harbor-workers Compensation Act (33 U.S.C. 901, et seq. as amended 1972) have a cause of action for loss of consortium against the vessel upon which her husband was injured?

II.

If the wife of a non-fatally injured longshoreman does not have a cause of action pursuant to the Longshoremen and Harborworkers Compensation Act, (33 U.S.C., §901, et seq.) then does American Export Lines v. Alvez, ____ U.S. _____, 100 S. Ct. 1673 (1980) afford such a remedy?

III.

By adding Section 905(B) to the LHWCA in 1972, did Congress statutorily

limit or pre-empt the field as to remedies available to longshoremen covered by such Act or those claiming damages as a result of injuries to such longshoremen and is there thereby a statutory exclusion of any remedy by a wife of such longshoreman for loss of consortium?

IV.

If the wife of a non-fatally injured longshoreman has a cause of action for loss of consortium for an injury to her longshoreman husband occurring after 1972 separate and apart from 33 U.S.C. §901(B), is such action one for negligent injury to her husband or for injuries as a result of unseaworthiness and can the vessel owner seek indemnity from her husband's stevedore employer as was the practice before the enactment of 33 U.S.C. §905(B) in 1972?

PARTIES TO THE PROCEEDING

The parties to the proceeding are: (1) Intercontinental Transportation Services, Limited; (2) Mrs. Howard F. McNeill; and (3) Midland Insurance Company.

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I

EARLIER REPORTS

This is a Petition to the United States Circuit Court of Appeals for the Fifth Circuit and specifically to its Opinion dated January 30, 1981. This opinion is set out, in full, in Appendix "A" to this Petition. This Opinion has not yet been reported.

II

JURISDICTION

This Honorable Court has jurisdiction under the terms of Section 1254 of Title 28, of the United States Code.

III

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below.

Mrs. Howard F. McNeill filed a civil action in the United States District Court for the Southern District of Mississippi on February 16, 1978, seeking damages for loss of consortium as a result of a non-fatal injury to her longshoreman husband on March 30, 1977, which injury occurred while he was working as a longshoreman in the employ of independent stevedore contractor, Sealand Terminals, Inc., on board the M/V LIMON then in navigation at Gulfport, Mississippi.

Petitioner Intercontinental Transportation Services, Ltd., owner of the M/V LIMON, filed a motion to dismiss the action alleging as grounds therefor that the complaint failed to state a cause of

action for which relief could be granted in that the wife of a non-fatally injured longshoreman injured subsequent to the 1972 Amendments to the Longshoremen and Harborworkers Compensation Act, 33 U.S.C. 901, et seq. does not have a cause of action for loss of consortium. On November 26, 1979, U.S. District Judge Harold Cox denied the motion to dismiss and certified the question to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. 1292(B) and stayed the proceeding pending determination of the application of Petitioner for leave to appeal. The Fifth Circuit granted leave to appeal on February 25, 1980, assigning to the case No. 80-3150. Subsequently, the matter was argued before the Fifth Circuit and on January 30, 1981, an unpublished per-curiam opinion was entered affirming the District Court's denial of the motion to

dismiss. The affirmance reads as follows: "The order of the United States District Court for the Southern District of Mississippi denying the motion to dismiss filed by the Defendant/Appellant (Intercontinental Transportation Services, Ltd.) is hereby affirmed. See American Export Lines v. Alvez, ____ U.S. ____, 100 S. Ct. 1673 (1980)."

B. Statement of the Facts.

Respondent's husband, Howard F. McNeill, was on March 30, 1977, employed as a longshoreman at Gulfport, Mississippi by Sealand Terminals, Inc., an independent contract stevedore, to load cargo on board the M/V LIMON an ocean-going vessel engaged in foreign trade then and there in navigation on waters of the United States at the port of Gulfport, Mississippi.

Mr. McNeill was and is subject to the Longshoreman and Harborworkers Compensation

Act as amended in 1972, 33 U.S.C. §901 et seq.

During the course of the loading of the M/V LIMON several of Mr. McNeill's fellow longshoremen were engaged in shifting the position of one of the ship's cargo booms when the boom suddenly dropped to the deck with one of the supporing cables apparently striking Mr. McNeill who, as a result of such striking, claimed permanent injuries in a lawsuit presently pending against Petitioner in the Southern District of Mississippi. Mr. McNeill has been since his injury and is now receiving medical payments and compensation from his employer, Sealand Terminals, Inc., or from their underwriters pursuant to the Longshoremen and Harborworkers Compensation Act (hereafter LHWCA).

Mrs. Howard F. McNeill, Respondent herein, does not work in any maritime

related employment and has never had any relationship by way of employment, contractual or otherwise, with Petitioner. Her suit against Petitioner is only for loss of consortium as a result of the alleged injury to her longshoreman husband.

IV

REASONS FOR GRANTING THE WRIT

Prior to this Court's opinion in American Export Lines v. Alvez, ____ U.S. ____, 100 S. Ct. 1673 (1980), (hereinafter referred to as Alvez) the Fifth Circuit followed Ignere v. CIE da Transports Oceaniques, 323 F. 2d 257, (C.A. 2, 1963), cert. den. 376 U.S. 949, 84 S. Ct. 965, 11 L. Ed. 2d 969 (1964). See Kristofferson v. Halliburton Company, 534 F. 2d 1147, (C.A. 5, 1976). The Fifth Circuit has now erroneously accepted the Alvez opinion as having post 1972 Amendment applicability. The Alvez opinion, like

hundreds of other pre-1972 amendment opinions relating to longshoreman injuries, unseaworthiness and third party claims by vessels over against stevedores, is inapplicable to post 1972 amendment actions.

This Court at Footnote 2, 100 S. Ct. 1675, in the Alvez opinion noted that Mr. Alvez's injury was sustained before the effective date of the 1972 Amendments to the Longshoremen and Harborworkers Compensation Act, 33 U.S.C., §901, et seq.

At Footnote 10, 100 S. Ct. 1679, in the same opinion, the possibility of statutory pre-emption was noted. "Respondent Joseph Vinial Ship Maintenance, the interest of which paralleled petitioners, has advanced the argument that recovery for loss of society is barred by the Longshoremen and Harborworkers Compensation Act as applicable at the time of the injury - i. e., before the 1972 Amendments. It does

not appear that this contention was raised below; in any event it has no merit. Whatever the limitations on recovery against employers under the pre-1972 LHWCA, based upon the warranty of seaworthiness." The 1972 Amendments eliminated the right of recovery by a longshoreman against a vessel based upon warranty of seaworthiness. 33 U.S.C., §905(B).

Section 905(B) was added in its entirety by the 1972 Amendments and provides that the LHWCA is the exclusive remedy against a vessel such as the LIMON and eliminated any action based upon the warranty of seaworthiness and further provides in the last sentence thereof: "The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act." Other sections of the LHWCA when

read in conjunction with 905(B) reinforces the exclusivity of the Act.

Mrs. McNeill must find a remedy under the LHWCA against the M/V LIMON and its owner or she has no remedy at all. The Amendments to the Act are part of a comprehensive statutory scheme which eliminated the round robin third party action against longshoreman's employers, eliminated the warranty of seaworthiness, and greatly increased benefits to the longshoreman. A wife must generally share the benefits of the increased compensation to her non-fatally injured husband and is thereby at least indirectly benefited by the increased benefits enacted in 1972. It was not contemplated by the Act that the wife would have a separate cause of action and a recovery separate and apart from her husband.

The unrestricted application of

Alvez to post 1972 LHWCA Amendment cases is contrary to the statutory scheme as set forth in 33 U.S.C. §901, et seq. There was a clear pre-emption by Congress of all actions against a vessel such as the LIMON as a result of injuries covered by the LHWCA.

V

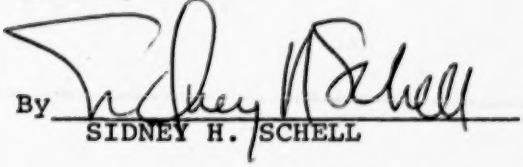
PRAYER

THEREFORE, the Fifth Circuit Court of Appeals was in error in affirming the District Court's denial of the motion to dismiss on the grounds that Mrs. McNeill had no cause of action for loss of consortium for an LHWCA covered injury to her husband. Because of the widespread and adverse impact that the application of Alvez to post 1972 Amendment cases will have the undersigned respectfully prays that this Honorable Court issue a writ of certiorari to consider the applicability of Alvez to post 1972 Amendment

situations.

Respectfully submitted,

REAMS, WOOD, VOLLMER,
PHILIPS, KILLION &
BROOKS, P.C.

By 
SIDNEY H. SCHELL

Attorney for Petitioner
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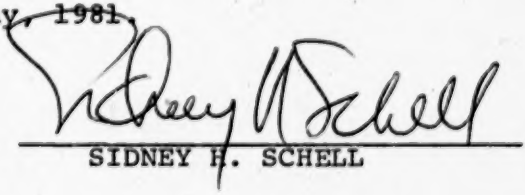
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing revised petition for writ of certiorari has been served upon counsel for all parties to this proceeding, by mailing the same to each by First Class United States Mail, properly addressed, and postage prepaid on this 13 day of May, ~~1981~~.


SIDNEY H. SCHELL

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
Unit A

NO. 80-3150

MRS. HOWARD F. MCNEILL,

Plaintiff-Appellee,

v.

INTERCONTINENTAL TRANSPORATION SERVICES, LTD.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Mississippi

---

(JANUARY 30, 1981)

Before COLEMAN, Chief Judge, WISDOM and RANDALL, Circuit Judges, PER CURIAM:

The order of the United States District Court for the Southern District of Mississippi denying the motion to dismiss filed by the Defendant-Appellant is hereby affirmed. See American Export Lines v.

Alvez, ____U.S.____, 100 S. Ct. 1673 (1980).

AFFIRMED

S/ J.P.C.
S/ J.M.W.
S/ Clk.

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
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RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The parties to the proceeding are: (1) Intercontinental Transportation Services, Limited; (2) Mrs. Howard F. McNeill; and (3) Midland Insurance Company.

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IN THE

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OCTOBER TERM, 1980

NO. 80-1919

INTERCONTINENTAL TRANSPORTATION SERVICES, LIMITED,
Petitioner

vs.

MRS. HOWARD F. McNEILL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Mrs. Howard F. McNeill, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the United States Court of Appeals for the Fifth Circuit's opinion in this case.

QUESTIONS PRESENTED

Contrary to Petitioner's recitation of questions presented for review, there is only one question presented to this Court, namely:

> Does the wife of a non-fatally injured longshoreman whose husband is subject to the Longshoremen and Harborworker's Act (33 U.S.C. 901 et seq., as amended 1972) have a cause of action for loss of consortium against the vessel upon which her husband was injured?

STATEMENT OF THE CASE

Respondent, Mrs. Howard F. McNeill, adopts the petitioner's statement of the case.

STATEMENT OF FACTS

Respondent, Mrs. Howard F. McNeill, adopts the petitioner's statement of facts.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Neither the decision below nor the record raises the questions presented in the petition save the one question noted in this response.

The only question presented in this case has already been answered. In American Export Lines, Inc. v. Alvez, 446 U.S. 274, 100 S.Ct. 1673, 64 L.Ed 2d 284 at 287 (1980), this Court said:

> "The question in this case is whether general maritime law authorizes the wife of a harbor worker injured non-fatally aboard a vessel in state territorial waters to maintain an action for damages for the loss of her husband's society." at P. 287.

And the Court responded:

> "We conclude that general maritime law does afford the wife such a cause of action." at P. 287.

This Court made no distinction between the pre or past Longshoreman and

Harborworker's Amendments because under the aforesaid ruling there was no reason to do so. The recovery was granted under general maritime law!

2. Alvez is also dispositive because it was grounded upon the theory of negligence as is this post amendment case.

The argument of the petitioner wishes to forget that Alvez, supra, was based upon the grounds of negligence and unseaworthiness - not, as argues, unseaworthiness alone! Petitioner is attempting to develop a "strawman" easy to knock down with the misplaced argument that the 1972 amendments to the Longshoremen and Harborworker's Compensation Act (33 U.S.C., Sec. 905(b), did away with the right of recovery by a longshoreman against a vessel based upon warranty

of unseaworthiness. This argument is irrelevant and immaterial to this case because the action below was not grounded for recovery on unseaworthiness but negligence! See: Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1288 (5th Cir. 1977); Samuels v. Empresa Lineas Maritimas Argentinas, 573 F.2d 884 (5th Cir. 1978).

3. The landmark thrust of the 1972 Amendments of the Longshoremen & Harborworker's Act further support the cause of action of Mrs. McNeill.

From the teachings of Alvez, we know that there is a cause of action available to the plaintiff for loss of consortium as a result of a non-fatal injury to her longshoreman husband under general maritime law but there are other theories as well. Skidmore

v. Grueninger, 506 F.2d 716 (5th Cir. 1975), compare Moragne v. States Marine Lines, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970); Sealand Services, Inc. v. Gaudet, 414 U.S. 573, 95 S.Ct. 806, 39 L.Ed.2d 9 (1974).

In 1972, with the amendment of the Longshoremen & Harborworker's Compensation Act (LHWCA), 33 U.S.C., Sec. 901, et seq., the "Ancient Mariner" came landward and claimed the benefits of Restatement (Second) of Torts, Sec. 342 (1965) rather than the sea doctrine of "unseaworthiness". See: Gay v. Ocean Transport & Trading, Ltd., supra; Samuels v. Empresa Lineas Maritimas Argentinas, supra. Landward, the doctrine of loss of consortium is as well known (Miss. Code Ann., Sec. 93-3-1 (1972), Tribble v. Gregory, 288 So.2d 13 (Miss. 1974), as it is seaward. To quote Gaudet:

> "In fact, since the 17th Century, juries have assessed damages for loss of consortium--which encompasses loss of society--in civil actions brought by husbands whose wives have been negligently injured. More recently, juries have been asked to measure loss of consortium suffered by wives whose husbands have been negligently harmed." 39 L.Ed.2d 24.

The landward thrust of the 1972 amendments left longshoremen with not only land remedies but with all those remedies because the courts are:

> ". . . Compelled. . .to shape the remedy to comport with the humanitarian policy of the maritime law to show 'special solicitude' for those who are injured within its jurisdiction." Gaudet, supra, at 23.

And for the further reason that "no statutory language or 'established and inflexible rules' of maritime law require a contrary conclusion." Gaudet, supra, at 20. See: Pesce v. Summa Corp., 54 Cal.App.3d, 86, 126 Cal. Rptr. 451 (1975).

In the cause sub judice, Mr. McNeill under the teachings of Gay, supra, and Samuels, supra, would have to proceed under the Restatement (Second) of Torts, Sec. 342 (1965). The section has been adopted in the State of Mississippi. See: McDonald v. Wilmut Gas & Oil Co., 180 Miss. 350, 176 So. 395 (1937); Marlon Investment v. Conner, 246 Miss. 343, 149 So.2d 312 (1963). Given the same facts as here, Mrs. McNeill would likewise have a cause of action under Miss. Code Ann. Sec. 93-3-1 (1972) which states in part: "A married woman shall have a cause of action for loss of consortium through negligent injury of her husband." See also: Tribble v. Gregory, supra. Under the general maritime law, she has the same cause of action for the reasons stated.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

HOPKINS AND LOGAN

BY: _____
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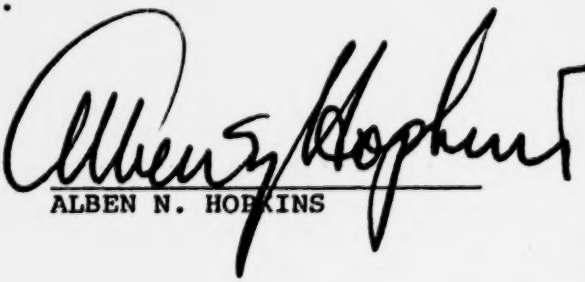
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari has been served upon counsel for all parties to this proceeding, by mailing the same to each by First Class United States Mail, properly addressed, and postage prepaid on this, the 21 day of August, 1981.



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